United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL WITH PROOF OF SERVICE

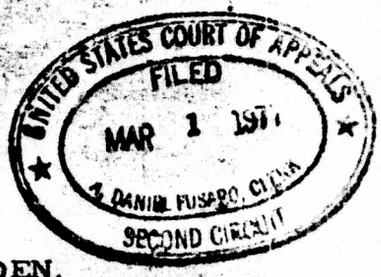
76-7452

To be argued by
IRVING L. GOLOMB
Time requested: 15 minutes

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



GERTRUDE J. BONIME and LILLIAN OLDEN,

Plaintiffs-Appellees,

-against-

JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LIMITED,

Defendants-Appellees,

-against-

GUARDIAN MANAGEMENT, S.A.,

Claimant-Appellant,

SAMUEL H. SLOAN,

Member of the Class-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEE CANADIAN JAVELIN LIMITED

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INDEX

TABLE OF CASES

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- x

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BRIEF OF APPELLEE CANADIAN JAVELIN LIMITED

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court entertain objections raised by appellant upon appeal for the first time?

2. Did the District Court abuse its discretion in approving the settlement?

3. Is the settlement fair and adequate?

4. Was the Notice of Proposed Settlement adequate and were the procedures proper?

5. Should this action be remanded to the District Court for claimed lack of finality of th judgment?

STATEMENT OF THE CASE

This is an appeal by a pro-se objector, Samuel H. Sloan, from the judgment made July 30, 1976 by Judge Morris E. Lasker, following a decision reported at 416 F. Supp. 1372 (S.D.N.Y. 1976) which approved the settlement of this class action.

Appellant made two objections to the settlement proposals considered by Judge Lasker.* His grounds were: (a) if he filed a proof of claim he would probably receive a warrant with little if any value, which it would be illegal for him as a United States resident to exercise, since trading in Canadian Javelin Limited (hereinafter "C.J.V.") stock was then suspended by the Securities and Exchange Commission (A60) and (b) that

*Appellant, without moving for leave to file late, has, out of time, filed a claim from which he has stricken the release clauses (A58).

counsel for the class were not entitled to fees (A61).

In asserting his first objection, appellant completely overlooked the fact that the notice of class action and of proposed settlement clearly advised its recipients that "Javelin (C.J.V.) has exercised its option as to the form of its payment into the Fund, by agreeing that it and individual defendants will pay the total amount of settlement, $1,350,000, in cash" (A146).

Appellant had served notice of his intention to appear at the October 17, 1975 hearing on the proposed settlement (A58). However, he did not appear thereat to offer any further or different objections. Now upon the appeal, he for the first time proffers, at pages 10-12 of his brief, a veritable grab-bag of objections, all except those above-mentioned representing new arguments not made by him below. However, the Points of his brief abandon most of these by failure to offer supporting arguments and authorities.

Although, among several thousand class members, Sloan was one of only eleven objectors to the proposed settlement, he is now the sole appellant.

The settlement offer of $1,350,000 (A11) was made as an entire indivisible offer to all purchasers of the stock of

C.J.V. between April 30, 1969 and October 24, 1973. It provided for allocation--after counsel fees--among the class members in two groups corresponding to two periods. The first, from April 30, 1969 through May 31, 1972, was to receive one-third and the second, from June 1, 1972 through October 24, 1973, to receive two-thirds (A20). These corresponded to the two areas of claimed liability alleged in the amended complaint, i.e., the Newfoundland Linerboard Project and the Panamanian Copper Project respectively. Plaintiff had claimed that defendants had made materially false and misleading statements and had omitted to state material facts, thus causing inflation of the price of C.J.V.'s stock and damage to the plaintiff and other purchasers of this stock (SA26-28). Defendants denied the material allegations of the amended complaint and asserted affirmative defenses, including failure to state a claim (A95, A99).

Extensive discovery was had, both of documents and witnesses (A100-102). The information disclosed that C.J.V. had strong defenses and that plaintiff's positions were, at best, on thin ground (SA6).

As to the Panamanian project, the C.J.V. press releases which claimed the right to mineral exploitation were based upon two contracts with the government of Panama. These

granted exploration concessions to C.J.V.'s subsidiary, Pavonia S.A. But Article 12(c) of the Mineral Resources Code of Panama provided that every exploration concession granted with it an extraction concession in accordance with the then existing Panama Mineral Resources Code (A105). By August 1971 when C.J.V. issued a press release with respect to its Panama concession, complained of by plaintiffs, a commercial ore body had already been discovered (A105). Since the Mineral Code was not applicable to a project of this magnitude and did not define all the terms and conditions of the contract which would cover the project, the government and C.J.V. agreed to negotiate a new contract. These negotiations were disclosed in the C.J.V. 1972 Annual Report (A105). The drafts of the proposed new Mineral Code in existence at the time of the June 22, 1973 press release by C.J.V., complained of by plaintiffs, showed no material changes in the Code (A106). By the time of a July 17, 1973 press release by C.J.V. there was still no indication that C.J.V. would not be receiving an exploration contract (A106). On August 22, 1973 the Panama Mineral Resources Code was amended to provide that a holder of an exploration concession had the first option to negotiate an extract concession on terms stipulated by the government. A minister of the government then made public statements

to the effect that C.J.V. did not have a vested interest in an exploitation agreement (A107). Three opinions of counsel were then procured to the effect that C.J.V. had a vested right to an exploitation contract (A107). The government continued to negotiate and there was no reason to believe that a favorable exploitation contract would not be offered. However, negotiations suddenly broke down in 1975 (A107).

C.J.V. had received a favorable feasibility study from Technical Economists Limited in November 1972 which it announced to shareholders on December 20, 1972 by a letter approved by the author of that study (A109). C.J.V. had further received a final commercial feasibility study from Wright Engineers in September 1973 (A109). Heavy duty road construction had been undertaken in 1973, referred to in a July 17, 1973 press release by C.J.V., and construction of an important bridge had begun (A109). Marketing arrangements with British Kynoch Ltd. had commenced in 1972 and a letter of intent had been proffered, then signed on September 11, 1973 (A111). It provided for negotiations to take the entire initial output of the Panama project, to be later extended, and further provided that Kynoch should assist in obtaining financing, using as security the contract to be negotiated. A letter of C.J.V. to its shareholders on

September 19, 1973, which was approved by a Kynoch representative, reported the letter of intent (A111-112).

An affiliate - C.J.V., Bison Petroleum Ltd., issued a July 5, 1973 press release announcing acquisition of a concession in Panama, in reliance on a June 21, 1973 resolution of the government of Panama and upon the fact that the execution of papers reflecting this grant was a mere formality (A112), as advised by counsel. When it learned that the requested concession violated an acreage requirement of the mineral code, as interpreted by the government, C.J.V. relinquished other acreage, reapplied shortly thereafter for the same concession and it was granted (A113).

Insofar as the Linerboard Project is concerned, this area of complaint was likewise shown by the facts, as developed in discovery, to have little likelihood of success. Pursuant to contracts with the Newfoundland government between 1967 and 1971, C.J.V. undertook a project involving the development of a Linerboard plant and a wood harvesting operation. The Newfoundland government agreed to guarantee completion of the construction and equipping of the project and to provide timber leases and electric power for the project. C.J.V. agreed to create a class of preferred voting shares and issued to the

government 5,300,000 such shares. This gave the government voting control over C.J.V. Further C.J.V. assigned to the government royalties with respect to any money the government might have to expend to cure any default (A114). The project was kept within the budget. No claim was made to the contrary (A116). Although C.J.V. attempted to have a contractor removed from the project, the government insisted on reinstatement of the project, under the same contractor (A116). The additional costs incurred because of poor performance by the contractor was compensated for by the fact that Cowan, the engineer who, pursuant to the contract, was its sole interpreter, ruled that equipment furnished by the contractor had become owned by C.J.V. because the rental payments had become equal to the market value of the equipment (A116). Despite some problems with the government, C.J.V. continued the project and in December 1971 the government guaranteed a $30,000,000 loan from a German bank and at various times in 1971 loaned $24,000,000 directly to C.J.V. to continue the project (A117).

Although the government did not issue timber leases or supply electric power, it allowed C.J.V. wood cutting rights to continue the project and the non-supply of electric power had no effect on the construction of the project (A117). With

a change of political control in the province of Newfoundland in January 1972, the new government took steps to take over the Linerboard project by negotiations which continued until an agreement was signed as of May 2, 1972. This was disclosed in a letter to stockholders on May 31, 1972 (A118). The agreement provided for repayment by the government to C.J.V. of certain liabilities, advances and expenditures in connection with the Linerboard Project to be the subject of a six-month audit as to whether the items involved were reasonable and necessary (A119). In addition, the agreement provided for the payment of certain amounts of cash. Negotiations as to the sums payable under the agreement continued between the government and C.J.V. over a period of months and into 1973. The government made certain payments at the end of 1972. When no further payments were made, a notice of arbitration was served on behalf of C.J.V. on June 22, 1973 (A120, 121). With the amount finally to be recovered from the government remaining open, the auditors for C.J.V. qualified their certification of the C.J.V. financial statements as being "subject to the eventual determination of the balance to be received from the government..." (A122).

Based upon the position of the auditors and the fact that the government had never refused to continue to negotiate

and had not made any final decision on disputed items, C.J.V., expecting a favorable resolution of its claims within twelve months, treated the sum due from the government as a current asset in 1972, after consultation with independent auditors (A122).

The facts thus evolved showed that while there might be differences of opinion as to whether every last detail of the company-government situations had or should have been disclosed, there were in both areas ample grounds for the C.J.V. defense that its public utterances were substantial and complete disclosures of the material facts. In the case of Panama, the company's rights under its written contracts with the government of Panama, supported by independent legal opinions which confirmed its exploitation rights, and the serious negotiations with major companies for financing and marketing, all within the background of feasibility studies received by the company, were a part of the evaluation as to the advisability of settlement. As to the Linerboard Project, the evidence shows that the project was within the budget and on schedule, that the Newfoundland government had made loans and guarantees, all followed by a rise in the price of the stock after disclosure of C.J.V.'s problems with the government (A127). Moreover, the

continued negotiations with the government, which never finally rejected C.J.V.'s contentions, strongly supported the claim that there had been proper disclosure of all material matters relating to the Linerboard project (A128).

As to the claim under Section 5 of the Securities Act, the fact that C.J.V. did not make any public offerings during the applicable period showed that the complaint as to alleged sale of unregistered securities to the public was unfounded (A128).

The matter of damages in the event of recovery was difficult of proof. The evaluation of the effect of C.J.V.'s alleged nondisclosures and statements on the market price of its stock was fraught with difficulties (A129-131). As admitted by plaintiffs' attorney, the adverse publicity in the media during the Linerboard project was a factor not measurable in terms of impact upon the C.J.V. stock price even assuming there had been insufficient disclosure by the company (A130).

With respect to the entire period covering the Linerboard and the Panama projects, the opinion of Dr. Roger F. Murray, professor at the Graduate School of Business, Columbia University, a man of outstanding qualifications, supported the defendants' estimates that the damages for the entire period

covered by the complaint could not exceed $2,500,000 (A130-131).

Notwithstanding their denials of liability and belief that they could prevail upon the merits, C.J.V. and the other defendants agreed to settle this litigation (SA4) in order to avoid the expense of continued litigation. The parties entered into a stipulation which contained alternate provisions for payment of the settlement (A14). One of these was a provision for $1,350,000 cash. The election as to which settlement procedure would be followed had to be made by the time of the Notice to the Class (A14-18). This election was indeed made and the members of the class were notified by the notice of class action determination that the settlement would be all cash, $1,350,000 (A139). The settlement offer was not, however, divisible, but required acceptance or rejection only in its entirety, as to both class periods.

THE SETTLEMENT PROCEDURES

The notice of class action determination and of proposed class action settlement and hearing contained a statement of the nature of the action; defendants' denials; the court order allowing the action to be maintained as a class action on

behalf of all purchasers of C.J.V. stock from April 30, 1969 through October 25, 1973; the pretrial discovery proceeding; the agreement to settle the case as a class action subject to court approval and notice to the class (A138). It described the class, and both the first and second class periods. It explained the settlement. It advised that class members would be entitled to a proportionate share of the fund upon the filing of proper proofs of claim, one-third of the fund to be allocated to the first class and two-thirds to the second. It stated the time and place of the hearing on approval of the settlement and invited all members of the class to appear and show any cause why the proposed settlement should not be approved as fair, reasonable and adequate and the litigation dismissed with prejudice, provided only that notice of intention to appear and a statement of the basis for objections be first filed and served. The notice advised that to receive the proportionate share of the $1,350,000 cash fund to which any class member may be entitled he was required to file a proof of claim and execute the releases set forth on the proof. It advised that each class member had a right to exclude himself from the class but that if he did not do so or file a proof of claim he would be barred from recovery. The method of requesting exclusion was described.

The intention of the attorneys for the plaintiffs to apply to the court for reimbursement of their expenses and legal fees of $260,000, subject to the determination of the court, was also set forth as well as that C.J.V. would bear all expenses of administration in consummating the settlement. Reference was made to two other purported class actions in Illinois by other stockholders, commenced after the instant action. In conclusion, the notice advised that the material contained in the notice was only a summary but that terms, conditions and provisions of the settlement agreement and all other papers were on file in the Clerk's office available for inspection and copying (A137 et seq.).

NOTICE TO THE CLASS

Copies of the notice of class action determination and of the proposed settlement and hearing were mailed by C.J.V. at considerable expense to all purchasers of C.J.V. stock over the period of April 30, 1969 to October 24, 1973, shown on the shareholders' records of C.J.V. The notice was printed in The New York Times, in the East and Midwest, Southwest and Pacific Coast editions of The Wall Street Journal, and in the national

edition of the Toronto Globe & Mail (A135, 136).

THE HEARING ON OBJECTIONS

Of a class of several thousand participants, only 11 individuals voiced objections to the proposed settlement on the hearing. Of these, three (the Lurie Group) had instituted the Illinois suits which substantially paralleled the instant suit (SA7). Objections were submitted orally and in writing. Expert testimony on damages was offered on behalf of the proponents of the settlement but none was offered in opposition at the hearing (SA6). Written material was submitted both at the hearing and subsequently in opposition to the proposed settlement (SA11, 12).

THE COURT'S DECISION

On June 30, 1976 the court handed down a decision which, after lengthy consideration of all the issues presented, found that the settlement merited approval (SA3-16). A judgment was then entered approving the settlement, adjudging it to be fair, adequate and reasonable, directing the defendants to pay the sum of $1,350,000 in settlement and dismissing the

action on the merits with prejudice. It further directed that all persons who are members of the class and who have not opted out be barred from further actions or asserting claims which had been or might be asserted arising from or related to the matters alleged in the amended complaint (A300-305).

The court considered the views of the proponents of the settlement and summarized their presentations (SA5). It recognized that C.J.V.'s silence on the problems alleged with respect to the Newfoundland Linerboard project was related to a dispute with the government which had become part of a political controversy between two political parties. The court analyzed the plaintiffs' position on the settlement as recognizing that any assessment of success must take serious consideration of the defendants' assertion of the truth of their statements or the existence of a reasonable basis for them, seriously undercutting any claim of wilfulness or of recklessness (SA6).

On the matter of damages, the court recognized that this was the weakest aspect of plaintiffs' case with respect to the first class period and that in the expert opinion of Dr. Murray, the maximum damage could not exceed $2,430,000 (SA7). The court held it was exceedingly difficult to determine the amount of damages plaintiffs could recover if they prevailed

at trial (SA13) and pointed out that the aggregate amounts of money lost by investors during the class periods, which would be set forth on the proofs of claim, was not the same as recoverable damages attributable to the wrongful conduct of the defendants (SA12). In conclusion, the court held that the compromise was within the "zone of reasonableness" in view of what was known about the merits of the case, the potential recovery, the consequent risks and complexities of trial (SA16). Accordingly the settlement was approved below.

Appellant Sloan has had full access to the claims filed and has reviewed them.

SUMMARY OF ARGUMENT

It is contended that the objections raised for the first time on this appeal should not be entertained; that the District Court did not abuse its discretion in approving the settlement; that the settlement was fair and adequate; that the Notice of Proposed Settlement was adequate and the procedures were proper; that the judgment below is final; that this action should not be remanded to the District Court and that the judgment should be affirmed. The formation and constitution

of the class were matters for the plaintiffs, as to which we take no position beyond noting that should the settlement not be approved, as an entirety, no part of the settlement will remain viable.

ARGUMENT

POINT ONE

APPELLANT HAS ABANDONED UPON APPEAL THE ISSUES HE ATTEMPTED TO RAISE BELOW. THE COURT SHOULD NOT NOW CONSIDER OBJECTIONS HE DID NOT MAKE BELOW.

The rule is well established that issues not raised in the District Court will not be considered upon appeal. U.S. v. Indiviglio, 352 F.2d 276 (2d Cir. 1965); U.S. v. Vater, 259 F.2d 667 (2d Cir. 1958); Green v. Brown, 398 F.2d 1006 (2d Cir. 1968).

The only exception to this rule indicated in the cited authorities is if the question raised is one of law, which if not considered, would cause a miscarriage of justice. On the face of appellant's brief it is apparent that this exception is inapplicable here. The court need, therefore, go no further but should affirm the judgment below. However, as will be shown in the balance of this brief, even if it were appropriate

to consider appellant's arguments, they are in any event without merit.

POINT TWO

APPELLANT HAS FAILED TO SHOW THAT THE DISTRICT COURT WAS GUILTY OF ABUSE OF DISCRETION. FAILING SUCH SHOWING, THE JUDGMENT BELOW MUST BE AFFIRMED.

In State of West Virginia v. Charles Pfizer & Co., 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir.), Cert. Dend. Cotler Drugs v. Charles Pfizer Co., 404 U.S. 871, 92 S.Ct. 81, 30 L. Ed. 2d 115, the Second Circuit held at p. 1085: "It appears to be well settled that in reviewing the appropriateness of the settlement approval, the Appellate Court should only intervene upon a clear showing that the trial court was guilty of an abuse of discretion", citing Conn. Railway and Lighting Co. v. New York, N.H. and H. RR., 190 F.2d 305, 308 and N. 3 (2d Cir. 1951).

The fact statement in this brief sets forth at considerable length the matters laid before the court and considered by it in arriving at the determination approving the settlement. The decision delves in minute detail into the evidence presented and considered. This includes an analysis of the

claims of the plaintiffs and the defenses, the likelihood of success or failure, the documentary support of defendants' position and the difficulty of establishing damages as well as other elements (SA1-16).

Appellant notes that the court's decision was made shortly after news that C.J.V. was in dire financial straits. C.J.V.'s financial position was a proper element for the court to take into consideration. The recovery of a substantial judgment after trial against a defendant incapable of satisfying it would be a pyrrhic victory which the courts would certainly wish to avoid by approving a settlement which could be expected to be consummated.

The United States Supreme Court has held in Protective Committee v. Anderson, 390 U.S. 414, 424-5, 88 S.Ct. 1157, 1163 (1968): "Further, the judgment should form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise."

In Newman v. Stein, 464 F.2d 689 (2d Cir. 1972), cert. dend. 409 U.S. 1039, 93 S.Ct. 521, 34 L. Ed. 2d 488, this court

enumerated the types of settlements which the Appellate Court could see fit to reverse. These are (a) when the trial court acted without sufficient facts concerning the claim, citing Ashbach v. Kirtley, 289 F.2d 159 (8th Cir. 1961); (b) when the court failed to allow objectors to develop on the record facts going to the propriety of the settlement, citing Cohen v. Young, 127 F.2d 721 (6th Cir. 1942); and (c) where there has been a clear error on the law regarding defendant's liability, citing Upson v. Otis, 155 F.Supp.2d 606 (2d Cir. 1966).

None of these situations is present here. All the facts set forth in this brief and more were before the court below. They were considered at great length; they were analyzed and summarized by the court in its decision approving the settlement.

The objectors were afforded the fullest opportunity to be heard and to submit papers even a considerable time after the hearing had been had. Appellant himself submitted no papers that were not accepted.

As to the law covering the liability of the defendants, it has not been argued by appellant that any error was committed. The decision below carefully considered the likelihood of success in the areas alleged in the complaint, as analyzed by the

Benedict Wolf affidavit submitted in support of the settlement and took into consideration that this was a plaintiff's view.

The Second Circuit has reiterated the rule of Newman v. Stein in Connecticut Railway and Lighting Co. v. New York, N.H. and H. RR., cit. supra, at 190 F.2d 308, "The approval of a compromise is a discretionary order which can be reversed only upon a clear showing of an abuse of discretion."

In Newman v. Stein, cit. supra, this court held at 464 F.2d 693 that the range of reasonableness with respect to a settlement recognized the uncertainties of law and fact and the concomitant risks and costs necessarily inherent in taking any litigation to completion and that the judge will not be reversed if the Appellate Court concludes that the settlement lies within that range.

In discussing the function of the judge before whom a settlement is placed for approval, it was held in City of Detroit v. Grinnell, 495 F.2d 448 (2d Cir. 1974) that great weight must be accorded the views of the trial judge because, being on the firing line, and exposed to the litigants, their strategies, positions and proofs, he may be expected to properly evaluate the action. Indeed the District Court arrived at its approval of the proposed settlement herein by utilizing and exceeding

the very process of "delicate balancing, gross approximations and rough justice," the elements approved in Grinnell, 495 F.2d at 468.

POINT THREE

THE SETTLEMENT WAS FAIR AND ADEQUATE.

The settlement herein for $1,350,000 in cash was most fair and reasonable, considering all the facts. Assuming recovery by the plaintiffs after trial, their damages would not have exceeded $2,500,000 as testified by Dr. Murray. Adding to this the manifold other difficulties of the plaintiffs in establishing proof of liability, the questionable nature of their first cause of action even as admitted by the attorneys for the class, the problems as to the evaluation of the effect of the alleged non-disclosures and statements on the market price of the stock, and all the other difficulties in the case, it cannot be said that the amount of the settlement was not within the range of reasonableness.

In Newman v. Stein, supra, the Second Circuit affirmed a settlement for one-seventh the damages sustained. The appellant had contended that this settlement was below the lowest

point of reasonableness. In rejecting this contention the court held that it was doubtful that inadequacy of information in proxy statements would have supported recovery on the basis of the claim that these statements were false and misleading and there was uncertainty in the law as to the right of recovery. By contrast, the settlement in the case at bar approximates half of the damages.

Appellant's only objection to the adequacy of the settlement is not substantive but procedural. He complains that the court did not first require a tabulation of the filed proofs of claim and a computation of the amounts payable to each claimant. To adopt this circuitous tactic would have had the effect of preventing any settlement whatever. It was not possible to know, at the time of the notice, the contents of proofs of claim which could only be filed after the receipt of the notice. Attempted compliance with appellant's suggested precondition for sending out the notice would therefore have meant that the notice could never be sent. This is particularly true in a situation such as the instant, in which the damages of the respective class members could not be known at the time of the notice or even at the time of the filing of their proofs of claim since the latter only show their losses, which may or

may not bear any relationship to the acts of the defendants, and as to which there were any number of intervening factors and causes other than those acts. Moreover, only after all of the claims are received--necessarily after the notices have themselves been sent out and received--would it be possible to know and advise each claimant as to the amount he might receive in settlement. This necessarily logical sequence has been totally ignored by the appellant.

POINT FOUR

THE NOTICE OF PROPOSED SETTLEMENT WAS ADEQUATE AND THE PROCEDURES WERE PROPER.

The notice herein fairly summarized the proceedings and described the proposed settlement and the options. It advised as to the right to be excluded and the consequences of nonexclusion and failure to file proofs of claim. It advised as to the pendency of the Chicago related suit and as to the procedures for reviewing claims and for final acceptance or rejection.

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1973), in discussing the requirements of a settlement notice, sets forth clearly that class members may not rely

on notices as a complete source of settlement information, holding:

> "Any ambiguities regarding the substantive aspects of the settlement could be cleared up by obtaining a copy of the agreement as provided for in the first paragraph of the notice. In effect, appellant is suggesting that a copy of the agreement must be included with the notice in order to satisfy due process standards. We have found no basis for such a requirement."

The court further held in Grunin that the notice may consist of a very general description of the proposed settlement. The notice herein was squarely within the standards in Grunin and referred to availability of the underlying documents and papers for inspection and copying (A48, 140).

Accordingly, any class member who wished could acquire further information. It is not claimed by appellant that he was not furnished any information requested. The notice was plainly proper.

The notice herein was mailed to all members of the class known to C.J.V. and was published widely in major newspapers. There is no support by appellant to any contention that the notice was not fairly given.

Appellant objects that the provisions of the settlement bar further actions by members of the class who do not exclude themselves. Even if there were no provision in the

settlement herein barring further action by members of the class, we submit that such acts would in any event have been barred by the application of the doctrine of res judicata. The settlement provision is therefore merely a statement of the existing law. In no way can the bar of further litigation be construed to bar a stockholders' derivative suit, if any were appropriate, arising out of the arrangement among the defendants for C.J.V. to pay the entire settlement. That would be a total distortion of the meaning of the clause in question. Moreover, as was clearly observed by the court below, the by-law provisions of C.J.V. which provide for indemnification of directors could be sufficient authority for the propriety of the C.J.V. agreement to pay the amount of the settlement, arising out of acts of its representatives in the course of corporate business (SA16).

Herbst v. IT&T, CCH Fed. Sec. L. Rep. §95, 696 (D.Ct. Conn., 1976) cited by appellant is inapplicable since the stipulation of settlement makes no provision for release of claims by C.J.V. but only by the individual members of the class. A derivative suit is clearly not therefore released by the stipulation.

POINT FIVE

THIS ACTION SHOULD NOT BE REMANDED TO THE DISTRICT COURT.

Appellant argues that because the matter of counsel fees and acceptance of proofs of claim remain unresolved, the judgment below is not final, and therefore requires that the case be remanded to the District Court.

However, there is no doubt under the cases that the judgment is final.* In City of Detroit v. Grinnell, cit. supra, it was held at 495 F.2d 448, 474

> "A final decision generally is one which ends the litigation on the merits and leaves nothing further for the court to do but execute the judgment."

The Tenth Circuit held, in Kasishke v. Baker, 144 F.2d 384, 386 (10th Cir. 1944)

> "A final decision is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination.
>
> "A judgment need not conclude the litigation as a whole in order to be final for purposes of appeal."

*Were appellant's argument to the effect that the judgment is not final taken literally, it would logically follow that his instant appeal does not lie and must be dismissed since he would be appealing from a non-final judgment.

The procedure herein followed of approving the settlement dismissing the action but reserving jurisdiction over the matters surrounding the carrying out of the settlement and counsel fees is regularly followed in matters similar to the instant case. Some of these cases are: State of West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir. 1971), cert. dend. Cotler Drugs, Inc. v. Charles Pfizer & Co., 404 U.S. 871 (1971); City of Detroit v. Grinnell Corp., 68 Civ. 4026 (January 23, 1973), aff'd City of Detroit v. Grinnell Corp., supra; Benzonia v. Greve, CCH Fed. Sec. L. Rep. §94, 912 (S.D.N.Y. 1974); Kasishke v. Baker, supra.

Since the judgment is final and it is entirely proper for the court to subsequently pass upon the question of attorneys' fees and to hold such hearings as may be necessary on rejected claims, there is no need to remand this case to the District Court. On the contrary, the judgment appealed from should be in all respects affirmed.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

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of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Julio VALLEJO, JR, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2742 Pitkin Ave Brooklyn N.Y. 11208

That on the 1st day of March, 1977, deponent personally served the within Brief for Appellee Canadian Javelin Limited upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving true copies of same with a duly authorized person at their designated office.~~

By depositing two true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

Samuel H. Sloan
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Julio Vallejo, Jr

Sworn to before me this
1st day of March, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978